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IN THE

Supreme Court of the United States

October Term, 1951.

No. 197.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Cross-Petitioner,

v.

HALCYON LINES AND VINKE AND COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR CROSS-PETITIONER.

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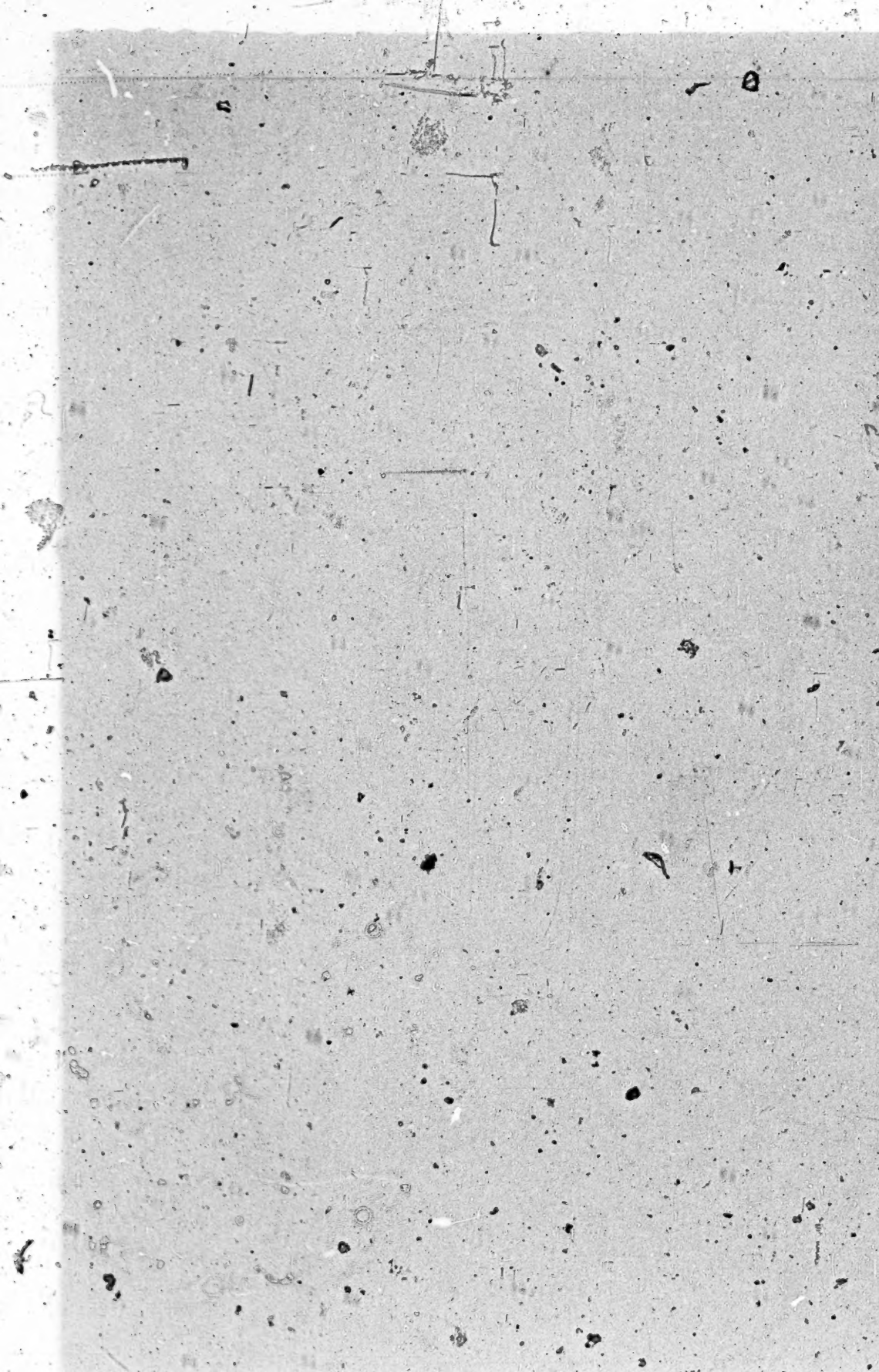

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF CROSS-PETITIONER, HAENN SHIP CEILING AND REFITTING CORPORATION, ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The Opinion of the United States District Court for the Eastern District of Pennsylvania denying Petitioner's motion for judgment notwithstanding the verdict and for a new trial is reported 89 F. Supp. 765, and appears in the record commencing at page 221.

The Opinion of the United States Court of Appeals for the Third Circuit is reported 187 F. 2nd 403, and appears in the record commencing at page 229.

JURISDICTION.

The jurisdiction of this Court to entertain this Petition is provided by Sections 1254(1) and 2101(c) of Title 28, United States Code.

QUESTIONS PRESENTED.

1. Where the instructions of the Trial Judge to the jury permit the jury to base its general verdict upon either one of two theories and one theory is erroneous, can a reviewing Court sustain the verdict upon the ground that there was evidence to support recovery upon the correct theory and therefore was not required to examine the incorrect instruction?

2. Where a shipowner furnishes the employees of a shoreside contractor with an appliance which fails in normal use, can the shipowner who has been sued by the injured employee recover contribution from the plaintiff's employer upon the ground that the employer was negligent in failing to inspect the appliance which the shipowner furnished and discover the defective condition which brought about the accident and injury to the additional defendant's employee?

3. Where a shipowner supplies an appliance to a contractor which is used in a normal manner, can the shipowner later claim that such use was negligent and a breach of duty to him?

4. Is the warranty of seaworthiness which a shipowner owes to a stevedore injured on board his vessel (*Seas Shipping Company v. Sieracki*, 328 U. S. 85) likewise owed to the employer of a shoreside carpenter who comes aboard the vessel for the purpose of making it ready to receive cargo?

SUMMARY AND STATEMENT OF THE CASE.

Factual History of the Case.

For brevity we shall throughout this brief refer to the original plaintiff as "Baccile," the original defendant as "Halcyon" and the third-party defendant as "Haenn."

Halcyon owned and operated the Dutch Steamship "Stad Vlaardingen." Prior to the voyage in question the vessel had sailed from Montreal to Rotterdam with a cargo of grain in bulk. In order to carry grain in bulk there was installed on the vessel equipment known as grain fittings. This installation was made at Montreal during October, 1946.

The nature of bulk grain is such that when it is loaded into a vessel it is loose, and when a vessel is at sea the motion or "working" of the vessel causes the grain to settle. The "Stad Vlaardingen" had large lower holds and a smaller space between the lower hold and the main deck. This space, known as the "'tween deck", was not utilized to carry bulk grain.

Because the grain in the lower hold does not always settle evenly and may shift with the roll of the ship it is necessary that the lower hold be kept full at all times so that the vessel's stability will not be affected. This is accomplished by erecting what is known as a grain feeder. This is nothing more than a four sided box, open at the top and bottom. It extends from the main deck to the top of the lower hold. When the lower hold is filled with grain the feeder is also filled. As the grain in the lower hold "works" and settles, the grain in the feeder feeds down and fills the spaces in the lower hold, thus keeping that space evenly loaded at all times during the voyage.

The grain feeder installed in the "Stad Vlaardingen" at Montreal (R. 110-112) was 10 feet high, 28 feet across or athwartship, and 8 feet fore and aft. It was constructed of rough planks running vertically. In order to seal the cracks between the planks burlap was draped inside the feeder.

When the feeder was built, stage planks were inserted near the bottom. These formed a scaffolding inside the feeder and upon these planks worked the men who built the feeder. These planks were left inside the feeder after its construction was finished so that they might be used by others who might at a later time find it necessary to work inside the feeder (R. 116).

There were six feeders, each leading to one of the six sections into which the lower hold of the "Stad Vlaardingen" was divided.

After the feeder was constructed at Montreal the vessel was loaded with grain, which it carried to Rotterdam. Apparently during the discharge operation there at least some parts of the grain fittings on the "Stad Vlaardingen" were damaged (R. 43, 44, 56 and 57).

On November 25, 1946, the "Stad Vlaardingen" arrived at Philadelphia. Haenn is a shoreside company at Philadelphia which is engaged in the work of repairing and refitting grain feeders and similar equipment in ships, principally those engaged in the grain trade. The Philadelphia agent for Halcyon notified Haenn that the "Stad Vlaardingen" would arrive and that some refitting and repairs would be required to the grain fittings already installed. The agent telephoned Haenn and in accordance with past dealings it was understood that the work would be performed on a time and material plus fixed fee basis. One of Haenn's supervisors went on board the vessel where he met her chief officer and a man named Campbell, who was an inspector for the Underwriters insuring the grain. The grain fittings had to be repaired and refitted as ordered by this inspector (R. 62).

We have pointed out above that there were six grain feeders on the vessel. In addition there was a temporary vertical wooden bulkhead known as a "shifting board" which ran fore and aft at the center line of each lower hold. As the three men, Knopf, representing Haenn, the chief mate representing the ship, and Campbell representing the

New York Board of Underwriters (R. 100), went around the ship, certain items to be corrected were pointed out. It is important to bear in mind that with respect to the feeder in question, the only work which Haenn was directed to do was to refasten the burlap draped inside the feeder (R. 45, 70, 79, 83). It had apparently been torn loose from its original fastenings during the loading at Montreal or the unloading at Rotterdam. It is also important to bear in mind that in the bottom of each of the feeders were stage planks similar to the one which plays such an important part in the factual background of the present case.

Haenn's employees, including the original plaintiff, Baccile, boarded the "'Stad Vlaardingen" at 1:00 P. M. on November 25. The Haenn employees were divided into four groups, each under a sub-foreman. Some were to work in the lower holds repairing the shifting bulkhead. The group of which Baccile was one went to the grain feeder at the No. 4 hatch and worked there until about 4:00 P. M. It is interesting to note that when Baccile was working on the grain feeder at the No. 4 hatch before he went to the one where he sustained his injuries, he stood on exactly the same type of stage plank as the one which later gave way and caused his injuries when he was working at the No. 2 feeder (R. 122-124). It is also a fact that before the accident at least one of the ship's officers saw Haenn's men so utilizing the planks (R. 102, 105).

About 4:00 P. M. Rickert, one of the sub-foremen, and Baccile left the feeder at the No. 4 hatch and went to the feeder at the No. 2 hatch. The only order for work at the No. 2 hatch had been to refasten the burlap (R. 45, 70, 79, 83).

Each feeder was divided in half by boards running vertically fore and aft at the center line. When Baccile and his Foreman Rickerts went to the No. 2 feeder, they twice utilized the boards at the bottom on one side as a place upon which to work, Baccile going inside the feeder and Rickerts standing on deck to steady the ladder and lower tools and

material to Baccile. Baccile then returned to the main deck, the two lowered the ladder into the other side of the feeder.

In accordance with longstanding custom, the ladder was lowered so that it rested on the stage plank at the bottom of the No. 2 feeder. It was this plank which later gave way.

The ladder then was used by Baccile and Rickert to tap the plank upon the theory that an unsound plank gives forth a different sound upon percussion than does a sound plank (R. 125). The plank in question passed this test and the bottom rung of the ladder was placed upon it. Baccile went down the ladder, stepped onto the plank, and walked along the plank to a corner where the burlap was torn away at a corner of the feeder. The burlap hung down so that it obscured the end of the plank where it was fastened to the side of the feeder. Standing on the plank, Baccile ascertained what materials he would need to refasten the burlap. As he was standing there and calling up requests for material he felt the plank "give" under him. He attempted to reach the end of the ladder but before he got to it, the end of the plank gave way at the point where it was fastened to the side of the feeder. Baccile fell to the bottom of the lower hold and was seriously injured.

The record is barren of any explanation for the failure of the plank to support the weight upon it. There is no evidence which would permit a finding or an inference as to whether, for instance, the plank had been insecurely nailed, whether the nails were originally or had become defective, or whether the nails had been improperly inserted; or whether the wood adjacent to the nails, either in the plank or in the supporting wooden members, had deteriorated so as to permit the nails to work loose. By the same token, there is no evidence as to whether a visual inspection, even a close inspection, would have revealed the defect, whatever it may have been, which permitted the end of the plank to give way.

For a consideration of Haenn's argument it is necessary to know that it is the practice that grain feeders similar to the one here in question are *always* fitted with stage planks at the bottom and that workmen coming aboard to make alterations or minor repairs to the feeders *always* utilize these planks as the only available practical platform from which their work can be done (R. 129).

History of the Litigation.

On October 7, 1947 Baccile sued Halcyon. The charging portions of his Complaint (R. 7a) allege that *Halcyon* failed to provide him with a reasonably safe place in which to work and provided him with a dangerous and unseaworthy place in which to work on board its vessel.

Not until April, 1948 did Halcyon file its third-party Complaint against Haenn. It is important to note that the charging portions of the Third-party Complaint allege that Haenn failed to inspect the staging, subjected it to an unusual strain and failed to provide for Baccile's safety (R. 14, 15).

Although the Halcyon Third-Party Complaint against Haenn lists eight specifications of alleged negligence on the part of Haenn (Third-Party Complaint, Paragraph 7, R. 14-15) there was no evidence introduced in support of the averments of subsections (a), (b), (d) and (h).

When Haenn answered the Third-Party Complaint it denied negligence and breach of duty owing to Halcyon and pleaded as a separate defense its immunity from suit by Halcyon by reason of the provisions of Sec. 5 of the Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. 905. It is here conceded that Haenn has fulfilled the requirements of the Act with respect to procuring insurance *to secure its liability to Baccile under that Act.*

After various motions, one of which resulted in the preliminary decision with respect to paragraph 7 of the

Complaint (R. 40) the case was called for trial on November 21, 1949. By agreement of the parties Baccile's case was settled by Halcyon and judgment was entered in favor of the plaintiff and against Halcyon in the sum of $65,000.00. Halcyon then proceeded to try the issues framed by its third-party complaint against Haenn.

The attention of the Court is invited to the fact that Halcyon's original third-party complaint sought indemnity but that by stipulation, the third-party complaint was amended; the claim for indemnity was stricken out, and Halcyon alleged that Haenn was jointly liable with it to Baccile and should be required to contribute to Baccile's damages. The amended third-party complaint concluded with a demand for contribution from Haenn "in the event that [Halcyon and Haenn] are found to be jointly negligent in the premises . . ."

When the case was tried the District Judge submitted the issues as between Halcyon and Haenn to the jury under instructions which would have permitted a finding against Haenn upon either one of two theories. The two theories are probably most succinctly stated in the Opinion of the Court of Appeals in the following sentence:

> "On a review of the record, we conclude that there was sufficient evidence upon which the jury could reasonably find Haenn negligent, not merely in failing to inspect, but as well in failing to go about its work properly." (R. 231.)

With the case before the jury under instructions which would have permitted a verdict against Haenn either on the theory that it had failed to inspect the planking before permitting Baccile to use it, or that Haenn would be liable as well if it had failed to go about its work properly, a general verdict was returned. In addition to its general verdict the jury found that Haenn was negligent so as to contribute to Baccile's injury to the extent of 75% and that Halcyon had contributed 25%.

Thereafter, Haenn filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. In the event these were denied, it filed a motion to mold the verdict so that if any judgment was entered against Haenn, it would not exceed 50% of the amount for which Baccile's case had been settled by Halcyon.

The District Judge denied Haenn's motion for judgment notwithstanding the verdict and for a new trial but did mold the verdict so that he entered judgment in favor of Halcyon and against Haenn for $32,500.00.

Both Halcyon and Haenn appealed, Halcyon on the ground that the verdict should not have been molded and Haenn on the ground that judgment should have been entered in its favor notwithstanding the verdict.

The Court of Appeals indicated that although the case against Haenn had been submitted to the jury upon alternative grounds of liability it did not have to examine one of them because there was evidence to support the verdict upon the other ground. It therefore affirmed the judgment against Haenn but modified it so that Halcyon's judgment against Haenn was limited by the amount of compensation which Haenn would have been required to pay its employee Baccile under the Longshoremen's & Harbor Workers' Compensation Act.

Both Haenn and Halcyon filed petitions for certiorari and this Court has granted them.

ARGUMENT.

I. Where the Instructions of the Trial Judge to the Jury Permit the Jury to Base Its General Verdict Upon Either One of Two Theories and One Theory Is Erroneous, Can a Reviewing Court Sustain the Verdict Upon the Ground That There Was Evidence to Support Recovery Upon the Correct Theory and Therefore Was Not Required to Examine the Incorrect Instruction?

In the instant case the Trial Judge told the Jury that it could find Haenn liable upon either of two theories. Haenn would be liable, said the Court, if it was (1) negligent in failing to inspect the plank before sending its employee Baccile down upon it, or (2) negligent in going about its work in an improper manner. However, the theory of liability stressed by Halcyon during the trial was Haenn's alleged negligence in failing to inspect. This theory was Halcyon's first requested instruction (138a) and the most specific basis of liability submitted to the Jury in the charge (161a).

Quite naturally, it was the theory of recovery based upon failure to inspect which Haenn attacked most vigorously on appeal. Haenn's attack upon this theory was twofold. First of all, Haenn argued that there was no evidence whatever to support a finding that an inspection would have revealed the defective condition which caused Baccile's injuries. Secondly, Haenn argued at length that even if negligence on its part had been established in failing to inspect, nevertheless under a doctrine of primary and secondary liability, it could not be forced to contribute to Halcyon.

The Court of Appeals, while recognizing that there were two possible theories of recovery in the case, summarily disposed of the foregoing arguments with these words:

"On review of the record we conclude that there was sufficient evidence upon which the jury could reasonably find Haenn negligent, *not merely in failing to inspect*, but as well in failing to go about its work properly." (R. 185) (Emphasis ours.)

Since under the doctrine of primary and secondary liability it could be assumed that Haenn was negligent in failing to inspect, but such negligence would not permit enforcement by Halcyon of contribution, it is obvious that the Court of Appeals in no manner examined or disposed of Haenn's contentions. The Court of Appeals either conceded that the theory first mentioned was wrong but permitted recovery because the second theory had support in the evidence; or finding support for recovery on one theory, it felt that it was unnecessary to examine the other. However, under the verdict rendered, there was no way of ascertaining upon which theory the Jury reached its conclusion. It is submitted that either approach to the problem is incorrect.

The Court of Appeals must pass upon every possible theory of recovery which is bona fide contested, to determine if it is erroneous, when as here it is impossible to determine from the verdict how the Jury reached its conclusion. The Court of Appeals for the Fourth Circuit succinctly states the Federal rule in *Atlantic Coast Line v. Tiller*, 142 F. 2nd 718, 722 (1944), reversed on other grounds, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465:

"Furthermore, since the verdict was general, it is impossible to say whether it was based upon the issue that was properly submitted to the jury or upon the issue that should have been withdrawn. The rule to be applied in such a situation is stated in *Stokes v. United States*, 8 Cir., 264 F. 18, 23, as follows: '. . . A general verdict under an erroneous instruction cannot be upheld, when there were two theories submitted to the jury, on either of which they might

have founded it, under one of which the instruction was harmless, while under the other it was error, because the generality of the verdict renders it impossible to determine upon which theory the jury based it. They may have founded it upon the very issue to which the erroneous instruction related, and that instruction may have controlled and produced their finding. *State of Maryland v. Baldwin*, 112 U. S. 490, 493 and S. Ct. 278, 28 L. Ed. 822; *Lyon, Potter & Co. v. First National Bank of Sioux City* (8 Cir.), 85 F. 120, 123, 29 C. C. A. 45, 48; *Durant Mining Co. v. Percy Consolidated Mining Co.* (8 Cir.), 93 F. 166, 169, 35 C. C. A. 252, 255; *St. Louis, Iron Mtn. & Southern Ry. Co. v. Needham* (8 Cir.), 63 F. 107, 114 11 C. C. A. 56, 63, 25 L. R. A. 833; *What Cheer Coal Co. v. Johnson* (8 Cir.), 56 F. 810, 813, 6 C. C. A. 148, 151; *Cresswell Ranch and Cattle Co. v. Martindale* (8 Cir.), 63 F. 84, 90, 11 C. C. A. 33, 89.' See also *Wilmington Star Mining Co. v. Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708."

This Court first considered the question in *State of Maryland v. Baldwin*, 112 U. S. 490, 493, 5 S. Ct. 278, 28 L. Ed. 822. There the plaintiff, as an alleged heir, brought action on a bond of administrators of a decedent's estate. The administrators filed several pleas in defense, among which was a plea that the plaintiff was not an heir. The jury found a general verdict for the defendant. The opinion, by Mr. Justice Field, states:

"On the trial evidence was introduced bearing upon all the issues, and, if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered but its generality prevents us from perceiving upon which plea they found. If therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the in-

The Court then proceeded to examine the instructions to the jury in light of the evidence as to the plea of the plaintiff not being an heir. Finding error in the submission of that issue to the jury, this Court reversed and remanded.

The issue again came up in a negligence action which was before this Court in *Wilmington Star Mining Co. v. Minnie Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708 (1906). The action was for wrongful death which occurred in a mine explosion. The complaint set out eight separate counts of negligence. The jury returned a general verdict for the plaintiff. On review this Court found that, under the evidence, no recovery could have been predicated upon three of the eight counts submitted to the jury. It therefore reversed.

To the same effect are a host of cases from the lower Federal Courts: *New York & Porto Rico Steamship Co. v. Garcia*, 16 F. 2nd 734 (CCA 1, 1934); *Baltimore and Ohio R. Co. v. Deneen*, 161 F. 2nd 674 (CCA 4, 1947); *Baltimore and Ohio R. Co. v. Reeves*, 10 F. 2nd 329 (CCA 6, 1926); *Lyon, Potter & Co. v. First National Bank*, 85 F. 120 (CCA 8, 1898); *St. Louis I. M. & S. Ry. Co. v. Needham*, 63 F. 107 (CCA 8, 1894); *Nowery v. Johnson*, 69 F. Supp. 755 (DC, ED, PA 1946).

These cases are premised upon the proposition that a reviewing court is in no position to determine, either from the evidence or from the verdict, whether the jury imposed liability upon a correct theory or upon an erroneous one. That being so, a party cannot be forced to defend upon a multitude of theories and then see a verdict upheld because one of the possible theories of recovery submitted to the jury was sustained by the evidence. Yet that is precisely what occurred in the present case. Here Haenn denied liability, inter alia, upon the theory of its failure to inspect, and further denied that even if its negligence in this respect were assumed, it would give rise to a right to contribution on the part of Halcyon. The Court of Appeals disregarded this two-fold denial in its entirety, and

addressed itself solely to another facet of the case—Haenn's "failing to go about its work properly"—which, in the Court's Opinion would support the verdict.

Every consideration against confusion and surprise in litigation militates against the practice adopted by the Court of Appeals. The Rules of Civil Procedure prescribed by this Court for the United States District Courts impliedly recognize the argument we here make. Although no special verdict was returned here, Rule 49 provides for the use of special verdicts at the discretion of the Trial Judge. We submit that it is implicit in Rule 49 that where recovery is sought upon several theories, the Trial Judge and the reviewing court must know the ground for the jury's verdict before it is possible to deal justly and intelligently with it.

The failure of the Court of Appeals to examine Haenn's contentions goes to the very heart of this case. As we shall argue at some length in the following section of this Brief, even if Haenn were found to have been negligent in failing to inspect, its negligence in this respect would not give rise to a right to contribution on the part of Halcyon. *What is more fundamental, however, is that there is no evidence in the record to support the legal conclusion of liability of any sort on the part of Haenn, arising from any failure to inspect on its part.* We say this for one simple, yet abundantly sufficient reason: there was no evidence that an inspection, whether superficial or thorough, would have revealed the defect which subsequently caused or permitted Baccile to be precipitated into the lower hold. In other words, Halcyon never established any causal connection between the alleged failure to inspect and the ensuing accident.

All that the evidence establishes is that the end of the plank gave way. At best, this fact alone may give rise to legitimate speculation as to the reason for its giving way, but speculation is not sufficient to establish causal connection. It was Halcyon's burden to establish the causal

connection between the failure to inspect and the casualty, and the undisputed facts of this case indicate clearly that this burden was not met. As a matter of fact, it was not even approached.

That Halcyon cannot prevail, under the foregoing circumstances, upon any theory of Haenn's failure to inspect is amply supported by the authorities. Indeed, the proposition is so fundamental and so obvious that one could not reasonably expect to find it controverted frequently. The principle found apt expression in *Bruszewski v. Isthmian Steamship Company*, 163 Fed. 2d 720, where the Court said (at 163 Fed. 2d 722):

> "The difficulty with this argument [perhaps an inspection might have disclosed a defect] is that Plaintiff introduced no proof that, under the circumstances, it would have been reasonable to send somebody aloft to make a comprehensive inspection of the rigging, *or that such inspection would have revealed the danger presented by the block.*" (Emphasis ours.)

To the same effect are *Hook v. National Brick Co.*, 150 Fed. 2d 184, and *Doyle, Administratrix v. Atlantic Refining Co.*, 357 Pa. 92, 98. The American Law Institute, *Restatement of Torts*, Sec. 300, comment C, likewise adopts this principle in the following words:

> ". . . A failure to make an inspection does not create liability unless the inspection, if made, would have disclosed the particular defect which makes the use harmful to the other. . . ."

Since the jury in the case at bar was permitted to find liability against Haenn by reason of its alleged failure to inspect, and it is impossible on the state of the record to determine whether or not liability was founded upon that theory, upon the foregoing authorities the verdict against Haenn should not have been permitted to stand. In ignoring Halcyon's failure to prove any causal connection be-

tween Haenn's alleged failure in this respect and the accident, the Court of Appeals erred in affirming the judgment without examining Haenn's contention with respect to this basic infirmity in *Halcyon's* case.

In the Case at Bar the Courts Below Have Allowed a Party Primarily Liable to Recover Contribution From a Party Whose Liability Is But Secondary. This Is Contrary to Heretofore Well Settled Legal Principles.

Before commencing our main argument we would state certain precepts which we regard as fundamental.

An act which the law may classify as negligence does not *always* give rise to a legally *enforceable* cause of action. It does so only when the negligence constitutes the breach of a legal duty which one party, the defendant, owes to the other party, the plaintiff.

Contribution by its very nature runs between parties who are in pari delicto, i.e., whose negligent breach of duty toward the third party is of the same class, either both are primarily liable or both secondarily liable.

Indemnity is enforceable between parties whose liability is of a different class but the person primarily liable is entitled to recover neither contribution nor indemnity from the party whose negligence has been but a secondary cause of the injury to the third party.

Although the old Common Law first stated the rule that there could be no contribution, between "joint tort feasors",[1] and followed the rule of *Merryweather v. Nixan*,[2] that rule has now been modified to the point where contribution is the rule rather than the exception.[3]

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1. The term is inaccurate since "It is a first principle that liability in tort is several, not joint, however many may participate in inflicting the wrong and whether they act separately or in conjunction". McKenna v. Austin, 134 F. 2nd 659 at 622; Prosser Torts (1941) § 109; 2 Williston, Contracts (1936) § 338a.

2. 8 T.R. 186 (K.B. 1799).

3. Leflar, Contribution and Indemnity between Tort Feasors, 81 Pa. L. R. 130 (1932).

Much confusion has resulted from the failure to distinguish between contribution and indemnity. The foundation of Haenn's position before this Court is:

> If Haenn could have recovered full indemnity from Halcyon for all expenses incurred by it as the result of the injury to Baccile, then Halcyon cannot recover contribution in any amount. Under the fact, this case is clearly one where Haenn could have recovered indemnity if it had sought to do so and therefore Halcyon should not have judgment against Haenn in any amount.

We will proceed to demonstrate our thesis.

The well considered cases in the Maritime and Common Law of both England and the United States recognize the separate and mutually exclusive principles. In *Mowbray v. Merriweather*,[4] the plaintiff, a firm of contracting stevedores, agreed to discharge cargo from the defendant's vessel. The defendant was to supply chains for hoisting. One chain was defective, broke and injured an employee of the stevedore. The workman brought suit against his employer which settled and then sued the defendant-shipowner for indemnity. There was evidence that the defect in the chain could have been discovered by the stevedore upon an inspection. The Court granted the stevedore full indemnity and this was affirmed. The Court held that as between the plaintiff and the defendant the stevedore did not owe the vessel owner a duty to inspect the chain which the shipowner supplied. The Court recognized that as between the employer and the employee there was a duty to inspect and it was this which gave rise to the right of action which the injured workman had settled with his employer. The fact that the stevedore owed the duty of inspection to its employee did not mean that the same duty of inspection was owed to the shipowner by the employer. The stevedore was justified in relying upon the shipowner

4. 2 Q. B. 640.

to perform the latter's duty toward him and supply a chain proper for the use which both parties understood the chain would be put.

Standard Oil Co. v. Robbins Drydock & Repair Co.,[5] is one of many examples of the right to indemnity in the Maritime Law of the United States. A seaman employed by Standard had sued it by reason of injuries he sustained while proceeding from the deck of his vessel in drydock to the edge of the drydock. The gangway, owned and maintained by the drydock company, was defective. The seaman recovered against Standard, his employer, upon the ground that Standard had been negligent in failing to inspect and remedy the defective condition of the gangway furnished by the drydock company for the use of Standard's employees. Having paid the judgment against it, Standard sought and recovered full indemnity from the drydock company upon the principle that as between Standard and the drydock company, Standard's liability to the injured party was but secondary to the primary liability of the Drydock Company.

In the *No. 34*, 25 F. 2d 602, the Court of Appeals for the Second Circuit was dealing with a suit for indemnity by an employer for indemnification for the amount which he had paid one of his employees. The employee had been injured while using a ladder furnished the stevedores by the ship. The Court said:

> "If Boyer, as between himself and Hogan, was obliged to provide safe access to the lighter for Hogan's men, it cannot be doubted that Boyer was primarily liable and that Hogan (the employer) was entitled to full indemnity for the amount he had to pay by reason of Boyer's neglect".

For other maritime cases similarly recognizing the principle, see *The Lewis Luckenbach*, 207 F. 66; *Fauntleroy*

5. 32 F. 2nd 182.

v. Argonaut S. S. Line, 27 F. 2d 50; *The S. S. Samovar*, 72 F. Supp. 564; *Altadona v. United States*, 91 F. Supp. 33; and *D. M. Picton & Co. v. Eastes*, 160 F. 2d 189.

The principle pervades the law of torts. Section 95 of the *A. L. I. Restatement of the Law of Restitution*, provides:

> "Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition."

Numerous courts, state and federal, apply the rule in non-marftime cases. In *Boston Woven Hose & Rubber Co. v. Kendall*,[6] the suit was by an employer against the defendant who had installed a boiler in the defendant's factory. The boiler exploded because improperly installed. Employees of the plaintiff were injured. The plaintiff was sued by the employees upon the ground that it had failed to properly inspect and discover defects in the boiler which the defendant had installed. After settling with his employees, the plaintiff sued the defendant. Mr. Justice Holmes, then Chief Justice of the Supreme Court of Massachusetts, upheld the right of indemnity and said:

> ". . . Although (plaintiff was) . . . negligent as toward its servants it had shown all of the care which the defendants had a right to expect".
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> "The fact that the reliance (by the plaintiff upon the defendant) was not justified as towards the men

6. 59 N. E. 657 (Mass.).

(the injured employees) does not do away with the fact that the defendants invited it with notice of what might be the consequences if it should be misplaced . . .".

Otis Elevator Co. v. Maryland Casualty[7] was a case where the original cause of action arose by reason of the falling of an elevator in an office building. Maryland Casualty Company was the insurer of the building. Otis had installed and maintained the elevators defectively. The injured passengers sued on the ground that the building owner was negligent in failing to inspect and discover the defect. The passengers recovered against the building owner and the latter's insurer sued Otis and recovered. The Court said "The failure to inspect would have caused no damage without a primary cause".

Advanced Refrigeration Inc. v. United Motors Service, Inc.[8] was likewise a case where the right to indemnity was upheld. The plaintiff, Advanced, had removed refrigeration equipment and, finding that the difficulty was in the electric motor, turned it over to the defendant, United Motors Service, Inc., for repairs. The latter repaired the motor improperly, redelivered it to Advanced, and the latter installed it in a home. Because of the defective repairs, the house caught fire and the property owner sued and recovered a judgment against Advanced on the theory that, although Advanced had not performed the repair work, it had failed to properly inspect the motor before installing it. Advanced paid the judgment and sued United for indemnity. The Court held that Advanced was entitled to indemnity because Advanced had originally been held liable by reason of its failure to inspect and had not been negligent in any positive or creative way so as to contribute to the eventual harm. The Court said:

"... Courts make a difference between negligence in omission or failure to make proper inspection,

7. (Colo.) 33 Pac. (2) 974.
8. (Ga.) 26 S. E. (2) 789.

and negligence in the performance of positive and creative acts, *as where one creates or maintains the unsafe or dangerous thing causing the injury.*" (emphasis ours.)

There are hosts of other cases both maritime and non-maritime, decided by both state and federal courts. We here cite but a few of them.

Gray v. Boston Gaslight Co., 114 Mass. 149;
Hudson Valley Ry. Co. v. Mechanicsville Electric Light and Gas Co., 167 N. Y. S. 428;
Fulton Gas and Electric Co. v. Hudson River Telephone Co., 114 N. Y. S. 644; affirmed 200 N. Y. 287;
Mallory SS Co. v. Druham, (Ala.) 84 So. 874;
Busch and Latta Painting Co. v. Woerman Construction Co., 310 Mo. 419;
Reymer v. Consolidated Ice Co., 67 Pa. Sup. 468;
Fidelity and Casualty Co. of New York v. Federal Express, ~~163~~ 136 F. 2d 35;
Manning Mfg. Co. v. Hartol Products Corp., 99 F. 2d 813.

See cases collected 140 A. L. R. 1301.

Our position that in the case at bar the liability of Halcyon was primary and that of Haenn but secondary is buttressed by the obligation of a shipowner which was enunciated by this Court in *Seas Shipping Co. v. Sieracki.*[9] The doctrine of that case has been extended to cover a shoreside carpenter working aboard the vessel. *Sulovitz v. United States.*[10]

An examination of the Complaint by Baccile against Halcyon (R. 7) clearly indicates that Baccile predicated his cause of action against Halcyon upon its failure to provide him with a safe place in which to work and the fact that it

9. 328 U. S. 85.
10. 64 F. Supp. 637.

did provide him with an unsafe place to work and an unseaworthy appliance.

In effect what the two Courts below have held is that while Baccile was entitled to predicate a cause of action against Halcyon upon a breach of the so-called "warranty of seaworthiness" promulgated in the *Sieracki* Decision, *supra*, Haenn was not entitled to the benefit of that same warranty.

That is not logic nor, we submit, good law.

When Baccile was aboard Halcyon's ship he was there as one member of a class, the representatives of Haenn. Baccile was aboard in Haenn's shoes and his rights were neither more nor less than those of his employer. To each Halcyon owed the same duty. The duty was not varied one iota by the fact that Baccile was injured. The fact of injury had no effect upon the duty owing by Halcyon. It was merely another one of the steps necessary to give rise to a cause of action.

For the Courts below to have ignored this point and in effect to have held that Halcyon owed Baccile a different duty than that which it owed to Haenn is a modification if not an emasculation of the doctrine which this Court promulgated in the *Sieracki* decision. One of the bases of the doctrine of the *Sieracki* case was that

> "The latter (the employer of the injured stevedore) has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them".[11]

In the case at bar no evidence was introduced to show that the peril, the cleat which gave way, was obvious and there was certainly no evidence that any act of the employer created this situation. It was instead an appliance fur-

11. 328 U. S. 85 at 95.

nished by the shipowner for use in the manner in which Haenn's employees utilized it (R. 79, 115, 116, 125 and 129). Thus it comes within the rule of the cases cited above.

> *"This we say on the assumption that there is a manifest distinction, though at times lost sight of, between suits in contribution and suits in indemnity.* For, as is often said, the latter implies a primary or basic liability in one person, though a second is also liable with the first to a third. In such a case the discharge of the obligation by the second person leaves with him a right to secure compensation from the one who, as between themselves, is primarily liable."[12] (Emphasis ours.)

The District Court specifically refused to charge the jury on the subject of the duty which Halcyon owed to Haenn to furnish Haenn and its employees with a seaworthy vessel and appliances (R. 163) and the Court of Appeals has approved that rule. It seems to us that it is so demonstrably fallacious as to require a restatement by this Court of the fundamental rights and duties as among a shipowner, a contractor and the contractor's employee, and the extent of the seaworthiness doctrine promulgated by this Court in the *Sieracki* decision.

We urge that the correct rule is stated by the Court of Appeals for the Second Circuit in *Grasso v. Lorentzen*,[13] where the Court states:

> "The latter (the stevedore) could rely upon its (a strap furnished the stevedore by the shipowner) being suitable, its appearance not showing the contrary, without inspection for hidden defects before use".

The same rule has been stated another way in *Altadona v. United States*,[14] where the Court held, as follows:

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12. *George's Radio v. Capital Transit Co.*, 126 F. 2nd 219 at 222.
13. 149 F. 2nd 127 at 129.
14. 91 F. Supp. 33 at 36.

"Under the circumstances Mercantile (a ship repair contracting company) might assume that the place where its men were working, including the stanchions, were safe and in a safe condition. That does not mean that Mercantile could blindly have its men work in and around the guard rail without looking at it but if the appearance indicated no danger or defects an inspection for latent defects was not required of it. It would be unreasonable in the absence of any visible sign of defectiveness to expect Mercantile to minutely examine each and every part of the vessel where its men were working and to apply expert scrutiny of those parts and places before permitting its men to work there".

In concluding our argument on this subject we point out to the Court that in view of the evidence as to the custom to have stage planking in the bottom of grain feeders, there was an implied invitation by Halcyon to use this appliance in the usual way. The fact that other methods might have been utilized does not change that fundamental legal principle.

". . . While it is true, as the record reveals, that the independent contractors' rigging may have been fastened to the top of defendants' smoke stack by several methods, yet plaintiff's testimony clearly establishes the fact that . . . is the method ordinarily and customarily adopted by those engaged in stack painting and is as safe as any other known manner. Therefore, there was an implied invitation on the part of defendants for plaintiff to use this cable for that purpose . . .". *Sorrentino v. Graziano*, 341 Pa. 113 at 116.

The A. L. I. Restatement of The Law of Restitution, § 93, likewise applies.

"Where a person has *supplied* to another a chattel which because of the supplier's negligence or *other*

fault is dangerously defective for the use for which it is supplied and both have become liable in tort to a third person injured by such use, the supplier is under a duty to indemnify the other for expenditures properly made in discharge of the claim of the third person, if the other used or disposed of the chattel in reliance upon the supplier's care and if, as between the two, such reliance was justifiable." (Emphasis ours.)

The invitation to use was extended to Haenn, the contractor, as well as to Baccile, the contractor's employee. Both upon the principle that Halcyon thus furnished an appliance which was unseaworthy because it failed in normal use, and because of the equal right of both to rely upon Halcyon to fulfill its duty to furnish a seaworthy vessel, the primary liability for the injury to Baccile rested upon Halcyon. It was the party against whom judgment had been entered and the most that its proofs showed was a failure on the part of Haenn either to go about the work in a safer way or to inspect and discover the defect in the appliance which Halcyon had furnished to it. We urge that Haenn was not under any duty to Halcyon to go about Haenn's work in what, by hindsight, may prove to have been the safest way. It was entitled to go about its work in the usual way unless warned by Halcyon of the danger of such a course of action. Admittedly no such warning was given (R. 57). Alternatively Haenn was not under any duty to Halcyon to inspect and discover a defect in an appliance furnished to it no matter what duty Haenn may have had along these lines to Baccile. Halcyon does not stand in Baccile's shoes in seeking recovery from Haenn. Halcyon must predicate any right to contribution upon the breach of a duty which Haenn owed to it. We submit that the record in this case will not support a finding of the breach of any such duty and that under familiar legal principles Haenn's liability is but secondary and Halcyon, the party primarily liable, cannot recover either contribution or indemnity from Haenn. We liken it to an equitable estoppel which should

now prevent Halcyon from recovering from Haenn because Haenn utilized an appliance furnished by Halcyon and relied upon Halcyon to furnish a proper one for the purpose intended.

We respectfully submit that the result we here urge follows from prior decision by this Court in the following cases:

Washington Gaslight Co. v. District of Columbia;[15]

Union Stock Yards Co. v. Chicago, R. & Q. R. R. Co.;[16]

Fuller Co. v. Otis Elevator Co.[17]

In both the *Washington Gaslight* and *Fuller Co.* cases full indemnity was granted. In the *Union Stock Yards* case the action was for *indemnity*. Since the negligence charged to both parties was a failure to inspect, indemnity was not permitted. It is, however, implicit in the decision that the correct legal principle calls for the result we here urge. Particularly appropriate is this Court's reference to primary liability of a party "who *furnishes* a defective dock" (emphasis ours). The Court was there referring to *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*[18] which it had cited earlier in its Opinion.[19]

This is not a case where both Halcyon and Haenn were guilty of the same breach, failure to inspect. Halcyon would have this Court so believe.[20] In so arguing Halcyon ignores the fact that it *furnished* the appliance which failed and that it had another and separate duty to supply a *seaworthy* appliance under the rule of the *Sieracki* case. We suggest that to accept Halcyon's argument would be tantamount to a holding that Haenn, the contractor, had a duty identical and co-extensive with that of Halcyon to furnish

15. 161 U. S. 316.
16. 196 U. S. 217.
17. 245 U. S. 489.
18. 134 N. Y. 461.
19. There is an excellent discussion of the Stock Yards case in *George's Radio, Inc. v. Capitol Transit Co.*, 126 F. 2nd 219 at 222. Mr. Chief Justice Vinson was a member of the Court which decided that case.
20. Halcyon's Brief as Petitioner in No. 62, page 14.

a seaworthy ship. It does not make for practical or legal logic to hold a contractor to such a duty.

As was said by the Court of Appeals for the Second Circuit in *American Mutual Liability Ins. Co. v. Matthews:*[21]

> "In both of those cases, the primary cause of injury to the employee was breach of a contractual duty owed to the promisee to do the work properly. In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. Nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise, such an implication would be utterly unreasonable."

CONCLUSION.

We respectfully urge that this Court examine and clarify the doctrine of indemnity in cases sounding in tort. A decision on this point logically precedes any determination of the *amount of contribution* or the effect of the Compensation Act upon the problem because if Haenn's position is correct and this Court so holds, the questions raised in Halcyon's Petition become moot.

Respectfully submitted,

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21. 182 F. 2nd 322 at 324.